

REGULATIONS

Pub. L. 103-160, div. A, title I, §158(c), Nov. 30, 1993, 107 Stat. 1582, provided that: "Regulations under subsection (b) of section 4543 of title 10, United States Code, as added by subsection (a), shall be prescribed not later than 30 days after the date of the enactment of this Act [Nov. 30, 1993]."

PILOT PROGRAM ON SALES OF MANUFACTURED ARTICLES AND SERVICES OF CERTAIN ARMY INDUSTRIAL FACILITIES WITHOUT REGARD TO AVAILABILITY FROM DOMESTIC SOURCES

Pub. L. 107-314, div. A, title I, §111(c), Dec. 2, 2002, 116 Stat. 2473, provided that: "The Inspector General of the Department of Defense shall review the experience under the pilot program carried out under such section 141 [section 141 of Pub. L. 105-85, set out as a note below] and, not later than July 1, 2003, submit to Congress a report on the results of the review. The report shall contain the views, information, and recommendations called for under subsection (d) of such section (as redesignated by subsection (b)(2)). In carrying out the review and preparing the report, the Inspector General shall take into consideration the report submitted to Congress under such subsection (as so redesignated)."

Pub. L. 105-85, div. A, title I, §141, Nov. 18, 1997, 111 Stat. 1652, as amended by Pub. L. 106-65, div. A, title I, §115, Oct. 5, 1999, 113 Stat. 533; Pub. L. 107-107, div. A, title I, §112, Dec. 28, 2001, 115 Stat. 1029; Pub. L. 107-314, div. A, title I, §111(a), (b), Dec. 2, 2002, 116 Stat. 2473; Pub. L. 108-375, div. A, title VIII, §844, Oct. 28, 2004, 118 Stat. 2019, provided that:

"(a) **PILOT PROGRAM REQUIRED.**—During fiscal years 1998 through 2009, the Secretary of the Army shall carry out a pilot program to test the efficacy and appropriateness of selling manufactured articles and services of Army industrial facilities under section 4543 of title 10, United States Code, without regard to the availability of the articles and services from United States commercial sources. In carrying out the pilot program, the Secretary may use articles manufactured at, and services provided by, not more than three Army industrial facilities, except that during fiscal year 2002 the Secretary may only use articles manufactured at, and services provided by, not more than one Army industrial facility.

"(b) **TEMPORARY WAIVER OF REQUIREMENT FOR DETERMINATION OF UNAVAILABILITY FROM DOMESTIC SOURCE.**—Under the pilot program, the Secretary of the Army is not required under section 4543(a)(5) of title 10, United States Code, to determine whether an article or service is available from a commercial source located in the United States in the case of any of the following sales for which a solicitation of offers is issued during the period during which the pilot program is being conducted:

"(1) A sale of articles to be incorporated into a weapon system being procured by the Department of Defense.

"(2) A sale of services to be used in the manufacture of a weapon system being procured by the Department of Defense.

"(c) **TRANSFER OF CERTAIN SUMS.**—For each Army industrial facility participating in the pilot program that sells manufactured articles and services in a total amount in excess of \$20,000,000 in any fiscal year, the amount equal to one-half of one percent of such total amount shall be transferred from the sums in the Army Working Capital Fund for unutilized plant capacity to appropriations available for the following fiscal year for the demilitarization of conventional ammunition by the Army.

"(d) **REVIEW BY INSPECTOR GENERAL.**—The Inspector General of the Department of Defense shall review the experience under the pilot program under this section and, not later than July 1, 1999, submit to Congress a report on the results of the review. The report shall contain the following:

"(1) The Inspector General's views regarding the extent to which the waiver under subsection (b) en-

hances the opportunity for United States manufacturers, assemblers, developers, and other concerns to enter into or participate in contracts and teaming arrangements with Army industrial facilities under weapon system programs of the Department of Defense.

"(2) The Inspector General's views regarding the extent to which the waiver under subsection (b) enhances the opportunity for Army industrial facilities referred to in section 4543(a) of title 10, United States Code, to enter into or participate in contracts and teaming arrangements with United States manufacturers, assemblers, developers, and other concerns under weapon system programs of the Department of Defense.

"(3) The Inspector General's views regarding the effect of the waiver under subsection (b) on the ability of small businesses to compete for the sale of manufactured articles or services in the United States in competitions to enter into or participate in contracts and teaming arrangements under weapon system programs of the Department of Defense.

"(4) Specific examples under the pilot program that support the Inspector General's views.

"(5) Any other information that the Inspector General considers pertinent regarding the effects of the waiver of section 4543(a)(5) of title 10, United States Code, under the pilot program on opportunities for United States manufacturers, assemblers, developers, or other concerns, and for Army industrial facilities, to enter into or participate in contracts and teaming arrangements under weapon system programs of the Department of Defense.

"(6) Any recommendations that the Inspector General considers appropriate regarding continuation or modification of the policy set forth in section 4543(a)(5) of title 10, United States Code."

§ 4544. Army industrial facilities: cooperative activities with non-Army entities

(a) **COOPERATIVE ARRANGEMENTS AUTHORIZED.**—A working-capital funded Army industrial facility may enter into a contract or other cooperative arrangement with a non-Army entity to carry out with the non-Army entity a military or commercial project described in subsection (b), subject to the conditions prescribed in subsection (c).

(b) **AUTHORIZED ACTIVITIES.**—A cooperative arrangement entered into by an Army industrial facility under subsection (a) may provide for any of the following activities:

(1) The sale of articles manufactured by the facility or services performed by the facility to persons outside the Department of the Army.

(2) The performance of work by a non-Army entity at the facility.

(3) The performance of work by the facility for a non-Army entity.

(4) The sharing of work by the facility and a non-Army entity.

(5) The leasing, or use under a facilities use contract or otherwise, of the facility (including excess capacity) or equipment (including excess equipment) of the facility by a non-Army entity.

(6) The preparation and submission of joint offers by the facility and a non-Army entity for competitive procurements entered into with Federal agency.

(c) **CONDITIONS.**—An activity authorized by subsection (b) may be carried out at an Army industrial facility under a cooperative arrange-

ment entered into under subsection (a) only under the following conditions:

(1) In the case of an article to be manufactured or services to be performed by the facility, the articles can be substantially manufactured, or the services can be substantially performed, by the facility without subcontracting for more than incidental performance.

(2) The activity does not interfere with performance of—

(A) work by the facility for the Department of Defense; or

(B) a military mission of the facility.

(3) The activity meets one of the following objectives:

(A) Maximized utilization of the capacity of the facility.

(B) Reduction or elimination of the cost of ownership of the facility.

(C) Reduction in the cost of manufacturing or maintaining Department of Defense products at the facility.

(D) Preservation of skills or equipment related to a core competency of the facility.

(4) The non-Army entity agrees to hold harmless and indemnify the United States from any liability or claim for damages or injury to any person or property arising out of the activity, including any damages or injury arising out of a decision by the Secretary of the Army or the Secretary of Defense to suspend or terminate an activity, or any portion thereof, during a war or national emergency or to require the facility to perform other work or provide other services on a priority basis, except—

(A) in any case of willful misconduct or gross negligence; and

(B) in the case of a claim by a purchaser of articles or services under this section that damages or injury arose from the failure of the United States to comply with quality, schedule, or cost performance requirements in the contract to carry out the activity.

(d) ARRANGEMENT METHODS AND AUTHORITIES.—To establish a cooperative arrangement under subsection (a) with a non-Army entity, the approval authority described in subsection (f) for an Army industrial facility may—

(1) enter into a firm, fixed-price contract (or, if agreed to by the non-Army entity, a cost reimbursement contract) for a sale of articles or services or use of equipment or facilities;

(2) enter into a multiyear contract for a period not to exceed five years, unless a longer period is specifically authorized by law;

(3) charge the non-Army entity the amounts necessary to recover the full costs of the articles or services provided, including capital improvement costs, and equipment depreciation costs associated with providing the articles, services, equipment, or facilities;

(4) authorize the non-Army entity to use incremental funding to pay for the articles, services, or use of equipment or facilities; and

(5) accept payment-in-kind.

(e) PROCEEDS CREDITED TO WORKING CAPITAL FUND.—The proceeds received from the sale of an article or service pursuant to a contract or

other cooperative arrangement under this section shall be credited to the working capital fund that incurs the cost of manufacturing the article or performing the service.

(f) APPROVAL AUTHORITY.—The authority of an Army industrial facility to enter into a cooperative arrangement under subsection (a) shall be exercised at the level of the commander of the major subordinate command of the Army that has responsibility for the facility. The commander may approve such an arrangement on a case-by-case basis or a class basis.

(g) COMMERCIAL SALES.—Except in the case of work performed for the Department of Defense, for a contract of the Department of Defense, for foreign military sales, or for authorized foreign direct commercial sales (defense articles or defense services sold to a foreign government or international organization under export controls), a sale of articles or services may be made under this section only if the approval authority described in subsection (f) determines that the articles or services are not available from a commercial source located in the United States in the required quantity or quality, or within the time required.

(h) EXCLUSION FROM DEPOT-LEVEL MAINTENANCE AND REPAIR PERCENTAGE LIMITATION.—Amounts expended for the performance of a depot-level maintenance and repair workload by non-Federal Government personnel at an Army industrial facility shall not be counted for purposes of applying the percentage limitation in section 2466(a) of this title if the personnel are provided by a non-Army entity pursuant to a cooperative arrangement entered into under subsection (a).

(i) RELATIONSHIP TO OTHER LAWS.—Nothing in this section shall be construed to affect the application of—

(1) foreign military sales and the export controls provided for in sections 30 and 38 of the Arms Export Control Act (22 U.S.C. 2770 and 2778) to activities of a cooperative arrangement entered into under subsection (a); and

(2) section 2667 of this title to leases of non-excess property in the administration of such an arrangement.

(j) DEFINITIONS.—In this section:

(1) The term “Army industrial facility” includes an ammunition plant, an arsenal, a depot, and a manufacturing plant.

(2) The term “non-Army entity” includes the following:

(A) A Federal agency (other than the Department of the Army).

(B) An entity in industry or commercial sales.

(C) A State or political subdivision of a State.

(D) An institution of higher education or vocational training institution.

(3) The term “incremental funding” means a series of partial payments that—

(A) are made as the work on manufacture or articles is being performed or services are being performed or equipment or facilities are used, as the case may be; and

(B) result in full payment being completed as the required work is being completed.

(4) The term “full costs”, with respect to articles or services provided under a cooperative arrangement entered into under subsection (a), means the variable costs and the fixed costs that are directly related to the production of the articles or the provision of the services.

(5) The term “variable costs” means the costs that are expected to fluctuate directly with the volume of sales or services provided or the use of equipment or facilities.

(Added Pub. L. 108–375, div. A, title III, §353(a), Oct. 28, 2004, 118 Stat. 1859; amended Pub. L. 109–163, div. A, title III, §321, Jan. 6, 2006, 119 Stat. 3191; Pub. L. 109–364, div. A, title X, §1071(a)(29), Oct. 17, 2006, 120 Stat. 2399; Pub. L. 110–181, div. A, title III, §328(a), Jan. 28, 2008, 122 Stat. 66; Pub. L. 111–84, div. A, title III, §324(a), Oct. 28, 2009, 123 Stat. 2253; Pub. L. 112–81, div. A, title III, §323(a), Dec. 31, 2011, 125 Stat. 1362.)

AMENDMENTS

2011—Subsec. (a). Pub. L. 112–81, §323(a)(1), struck out second sentence which read as follows: “This authority may be used to enter into not more than eight contracts or cooperative agreements in addition to the contracts and cooperative agreements in place as of the date of the enactment of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181).”

Subsec. (k). Pub. L. 112–81, §323(a)(2), struck out subsec. (k). Prior to amendment, text read as follows: “The authority to enter into a cooperative arrangement under subsection (a) expires September 30, 2014.”

2009—Subsec. (a). Pub. L. 111–84 inserted “in addition to the contracts and cooperative agreements in place as of the date of the enactment of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181)” after “not more than eight contracts or cooperative agreements”.

2008—Subsec. (a). Pub. L. 110–181, §328(a)(1), inserted at end “This authority may be used to enter into not more than eight contracts or cooperative agreements.”

Subsec. (k). Pub. L. 110–181, §328(a)(2), substituted “2014” for “2009”.

2006—Subsec. (d). Pub. L. 109–364 substituted “Arrangement” for “Arrangement” in heading.

Pub. L. 109–163, §321(b)(1), substituted “subsection (f)” for “subsection (e)” in introductory provisions.

Subsecs. (e), (f). Pub. L. 109–163, §321(b)(2), (3), added subsec. (e) and redesignated former subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (g). Pub. L. 109–163, §321(b)(4), substituted “subsection (f)” for “subsection (e)”.

Pub. L. 109–163, §321(b)(2), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (h).

Subsecs. (h), (i). Pub. L. 109–163, §321(b)(2), redesignated subsecs. (g) and (h) as (h) and (i), respectively. Former subsec. (i) redesignated (j).

Subsec. (j). Pub. L. 109–163, §321(b)(2), redesignated subsec. (i) as (j). Former subsec. (j) redesignated (k).

Pub. L. 109–163, §321(a), substituted “September 30, 2009.” for “September 30, 2009, and arrangements entered into under such subsection shall terminate not later than that date.”

Subsec. (k). Pub. L. 109–163, §321(b)(2), redesignated subsec. (j) as (k).

REPORTS

Pub. L. 110–181, div. A, title III, §328(b), Jan. 28, 2008, 122 Stat. 66, as amended by Pub. L. 111–84, div. A, title III, §324(b), Oct. 28, 2009, 123 Stat. 2253; Pub. L. 112–81, div. A, title III, §323(b), Dec. 31, 2011, 125 Stat. 1362; Pub. L. 112–239, div. A, title X, §1076(a)(2), Jan. 2, 2013, 126 Stat. 1948, provided that:

“(1) ANNUAL REPORT ON USE OF AUTHORITY.—The Secretary of the Army shall submit to Congress at the

same time the budget of the President is submitted to Congress for fiscal years 2009 through 2016 under section 1105 of title 31, United States Code, a report on the use of the authority provided under section 4544 of title 10, United States Code.

“(2) ANALYSIS OF USE OF AUTHORITY.—Not later than September 30, 2012, the Secretary of the Army shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report—

“(A) assessing the effect of the use of such authority on the rates charged by each Army industrial facility when bidding on contracts for the Army or for a Defense agency and providing recommendations to improve the ability of each category of Army industrial facility (as defined in section 4544(j) of title 10, United States Code) to compete for such contracts;

“(B) assessing the benefit to the Federal Government of using such authority;

“(C) assessing the impact of the use of such authority on the availability of facilities needed by the Army and on the private sector; and

“(D) describing the steps taken to comply with the requirements under section 4544(g) of title 10, United States Code.”

CHAPTER 434—ARMAMENTS INDUSTRIAL BASE

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§ 4551. Definitions

In this chapter:

(1) The term “ARMS Initiative” means the Armament Retooling and Manufacturing Support Initiative authorized by this chapter.

(2) The term “eligible facility” means a Government-owned, contractor-operated ammunition manufacturing facility, or a Government-owned, contractor-operated depot for the storage, maintenance, renovation, or demilitarization of ammunition, of the Department of the Army that is in an active, inactive, layaway, or caretaker status.

(3) The term “property manager” includes any person or entity managing an eligible facility made available under the ARMS Initiative through a property management contract.

(4) The term “property management contract” includes facility use contracts, site management contracts, leases, and other agreements entered into under the authority of this chapter.

(5) The term “Secretary” means the Secretary of the Army.

(Added Pub. L. 106–398, §1 [[div. A], title III, §344(a)(1)], Oct. 30, 2000, 114 Stat. 1654, 1654A–67; amended Pub. L. 109–163, div. A, title III, §323(a), Jan. 6, 2006, 119 Stat. 3193.)

AMENDMENTS

2006—Par. (2). Pub. L. 109–163, §323(a), inserted “, or a Government-owned, contractor-operated depot for the storage, maintenance, renovation, or demilitarization of ammunition,” after “manufacturing facility”.

CONSIDERATION OF ARMY ARSENALS’ CAPABILITIES TO FULFILL MANUFACTURING REQUIREMENTS

Pub. L. 113–66, div. A, title III, §323, Dec. 26, 2013, 127 Stat. 733, provided that: